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No. 90-1338

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GULF STATES UTILITIES COMPANY,
Petitioner,

v.

COALITION OF CITIES FOR AFFORDABLE UTILITY RATES,
OFFICE OF PUBLIC UTILITY COUNSEL,
CITY OF BRIDGE CITY, *et al.*, and
PUBLIC UTILITY COMMISSION OF TEXAS,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of Texas

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REPLY BRIEF OF GULF STATES UTILITIES COMPANY

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Pursuant to Rule 15.6 of this Court, Gulf States Utilities Company ("Gulf States") respectfully submits this reply brief.[1]

I. THE COURT HAS JURISDICTION TO GRANT GULF STATES' PETITION.

Respondents would have this Court deny Gulf States Constitutional protection with respect to the $1.453 billion expropriation it faces on the basis that Gulf States did not assert its Constitutional rights on a timely basis.

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[1] Gulf States has no parent corporation and all of its subsidiaries are wholly-owned.

Respondents err, however, when they claim that Gulf States' citations to *United States v. Utah Construction and Mining Co.*, 384 U.S. 394 (1966), before the Texas courts were insufficient to alert those courts that a federal Constitutional issue was present. *See* Brief of Respondents Bridge City *et al.* in Opposition to Petition ("Bridge City Brief") at 7-9; Joint Brief in Opposition of Respondents Coalition of Cities for Affordable Utility Rates and Office of Public Utility Counsel ("CAUR Brief") at 6-12. Gulf States met this Court's standards for raising its federal claims in a timely manner.

At each level of the Texas court system, Gulf States asserted in mandatory, imperative terms that there *must* be an actual resolution or determination of the dispute before preclusive effect can be given to an agency order.[2] Appendix to Petition for Writ of Certiorari ("App.") at 307a, 305a, 303a. In each instance, Gulf States first cited this Court's decision in *Utah Construction* as support for this mandatory requirement. App. at 307a, 305a, 303a.

Respondents and the Texas courts must fairly be charged with understanding that, in citing this Court's *Utah Construction* decision in the Texas courts to support the existence of a mandatory standard requiring actual resolution of the issue, Gulf States was asserting the existence of a minimum Constitutional standard. While there is federal common law relating to when preclusion may apply, that federal common law is not binding on the states. However, there is also federal law with re-

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[2] In its brief to the Texas Supreme Court, Gulf States relied on *Utah Construction* to support the statement: "Only matters that have been finally adjudicated and determined can be deemed conclusive of the rights of the parties in subsequent actions." App. at 303a. In its briefs to the court of appeals and the district court, Gulf States cited *Utah Construction* to support the statement: "Before the preclusive effects of *res judicata* or collateral estoppel apply, there must first be an actual resolution of the disputed facts after adequate opportunity for litigation." App. at 305a, 307a.

spect to minimum Constitutional due process standards regarding preclusion which does bind the states. *See, e.g., Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 482 (1982).[3] Thus, there would have been no reason to place primary reliance on *Utah Construction* simply to support Texas common law standards. The Texas cases cited in Gulf States' briefs would have been sufficient to establish, as a matter of Texas common law, that an issue must actually be resolved before preclusive effect is given to a prior order.[4] *See* App. at 307a, 303a. Accordingly, by citing *Utah Construction* to support a mandatory standard—and by citing it first—Gulf States indicated that a federal Constitutional requirement existed.

By stating that resolution of disputed facts was *required* and relying first on a U.S. Supreme Court de-

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[3] As noted in Gulf States' petition, this Court's decision in *Kremer* makes clear that preclusion has a Constitutional component: "A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment . . . ." Petition at 14 (citing 456 at 482).

The chain of precedent cited in *Utah Construction* demonstrates that preclusion has Constitutional aspects. *Utah Construction* cites a federal appeals court decision in support of its standards for applying preclusion to administrative decisions. 384 U.S. at 422 (citing *Seatrain Lines, Inc. v. Pennsylvania R.R. Co.*, 207 F.2d 255 [259] (3d Cir. 1953)). *Seatrain* cites *Chicago, R.I. & P. Ry. v. Schendel*, 270 U.S. 611 (1926), as precedent for determining when preclusion applies. *Schendel's* discussion of preclusion was based on the federal Constitution. 270 U.S. at 613.

[4] *Van Dyke v. Boswell, O'Toole, Davis & Pickering*, 697 S.W.2d 381 (Tex. 1985), stated that "Once an actually litigated and essential issue *is determined*, that issue is conclusive in a subsequent action between the same parties." *Id.* at 384 (emphasis added). *Tarter v. Metropolitan Sav. & Loan Ass'n*, 744 S.W.2d 926 (Tex. 1988), held that a subsequent action was not barred where the "ultimate issue" was different. *Id.* at 928-29. *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816 (Tex. 1984), held that collateral estoppel did not bar a subsequent claim because the issue in the second action had not been necessarily decided in the first. *Id.* at 818-19.

cision, Gulf States' actions were sufficient under this Court's standards "to alert" the Texas courts that it had raised a federal Constitutional issue. *See Taylor v. Kentucky*, 436 U.S. 478, 482 n.10 (1978) (petitioner's reference to "fundamental principle[s] of judicial fair play" should have sufficed "to alert trial judge to petitioner's reliance on due process principles"). Gulf States was not required to cite to "book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 114 n.9 (1982); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928) (need not cite to any "particular form of words or phrases."). Gulf States thus met this Court's standards for raising its federal claims in a timely manner.[5]

Moreover, although it chose not to deal with the *Utah Construction* issue, the Texas Supreme Court clearly was aware that the issue was present. The dissenting opinion below—portions of which are referenced in the opinion of the court (e.g., 798 S.W.2d at 565, App. at 10a)—cites the *Utah Construction* standards and states: "Application of collateral estoppel to administrative agency decisions in Texas should also pass the traditional test *in addition to* the standards articulated in *Utah Construction and Mining Co.*" 798 S.W.2d at 569, App. at 19a (emphasis added). This statement recognizes that the

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[5] The Court's decision in *Board of Directors v. Rotary Club*, 481 U.S. 537 (1987), relied on by respondents, is clearly distinguishable from this case. In *Rotary Club*, the Court held that a "casual reference to a federal case, *in the midst of an unrelated argument*, is insufficient . . . ." *Id.* at 550 n.9 (emphasis added). There, petitioner cited a decision of this Court to a state court to support its position that only a narrow construction of a statute could save its Constitutionality. *Id.* Later, in this Court, petitioner cited the same case to support its view that the statute was unconstitutionally overbroad. The Court concluded that the overbreadth issue was not properly raised below. *Id.* at 550. In contrast, Gulf States cited *Utah Construction* below for the same point it cites it here—that the state court must follow *Utah Construction's* standards before giving preclusive effect to administrative decisions.

Utah Construction standards set a floor and that the Texas courts may set additional requirements before applying preclusion to administrative decisions. The reasoning in the dissenting opinion is thus consistent with the principle that federal Constitutional principles provide a due process floor which the states must meet, but are free to exceed. The majority of the Texas Supreme Court was thus made aware by the dissent of this view as to the significance of *Utah Construction*. It chose to ignore the issue even though it responded to other points in the dissent. *E.g.*, 798 S.W.2d at 565 n.7, App. at 10a. This Court should not deny Gulf States Constitutional protection with respect to this extremely large investment on the basis of the Texas Supreme Court's failure to address the issue directly raised by its dissenters.

CAUR also errs in arguing that Gulf States failed to preserve the third question in its certiorari petition (required balancing of consumer and investor interests) by raising it only on rehearing below. CAUR Brief at 11-12. In footnote 18 to its petition, Gulf States explained why it could not have been expected to predict that the Texas Supreme Court would upset the balance of investor and consumer interests set by the Texas P.U.C. without providing an opportunity to reestablish that balance. Petition at 22. When a state supreme court "renders an unexpected interpretation of state law," federal claims are adequately preserved if they are presented for the first time on rehearing. *Great No. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 366-67 (1932) (the requirement that a federal issue must be raised prior to rehearing does not apply "where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right."); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-86 n.9 (1980) (federal claim adequately presented even though not raised in lower state courts when highest state court "renders an unexpected interpretation of state law").

In the decision at issue here, the Texas Supreme Court ruled for the first time that the Texas P.U.C. lacked the power under its enabling statute to defer a decision as to the appropriate rate treatment for a portion of an investment in new plant. Even if this Court concludes that such a result should not be regarded as "unexpected," what was entirely unexpected, and what gave rise to Gulf States' complaint in Section III of its petition, was the Texas Supreme Court's failure, having made this ruling of first impression concerning the Commission's enabling statute, to provide an opportunity for the P.U.C. to restore the required balance of investor and consumer interests. It was that failure which can fairly be regarded as "unexpected" and which Gulf States raised in Constitutional terms in its motion for rehearing. App. at 313a-314a. In doing so, Gulf States raised the balancing issue in a timely manner under the standards of *Sunburst* and *PruneYard*.

CAUR also argues that this Court lacks jurisdiction "[b]ecause no review of rates set in Commission Docket No. 7195 has yet been made by the Texas courts." CAUR Brief at 15. Gulf States' petition does not seek review of the rates set by the P.U.C. in Docket No. 7195. Rather, Gulf States seeks review of the Texas Supreme Court's decision that the P.U.C. cannot consider the prudence of $1.453 billion of Gulf States' investment in any future rate case. That is a final decision without respect to the outcome of the administrative appeal in Docket No. 7195.

Both CAUR and Bridge City argue that this Court lacks jurisdiction because the decision below rests on an adequate state ground. CAUR Brief at 12-13; Bridge City Brief at 10-11. Both assert that the state ground is the Texas Supreme Court's ruling that the Commission lacked the statutory authority to defer a ruling. *Id.* However, this analysis is circular and illogical. This state ground, by definition, rests on the proposition that the Commission *did* defer a decision on the prudence of that $1.453 billion. In so asserting, respondents tacitly con-

cede, *arguendo*, that this issue was not determined by the Commission. If that point is conceded, *arguendo*, the federal question urged by Gulf States—*i.e.*, whether giving preclusive effect to an order which did not decide the issue involved meets minimum due process standards—is squarely raised. Thus, the state ground urged by respondents cannot be accepted without raising the federal question presented.

II. CONTRARY TO RESPONDENT CAUR'S ASSERTIONS, GULF STATES' PETITION FAIRLY AND ACCURATELY PRESENTS THE FACTS.

When respondent CAUR addresses the substance of the due process questions raised by Gulf States' petition, it chooses to do so in terms which assert that Gulf States has presented this Court with "misstatements," "fictions" and "mythology." CAUR Brief at 19-29. Gulf States fairly and accurately presented the facts which raise the issues set forth in its Questions Presented. Petition at (i).

Each of the facts on which Gulf States relies to support its position on the questions presented is correctly stated in its petition.[6] It is also correct that the Commission's

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[6] Putting aside CAUR's invective-filled characterizations, Gulf States' petition points out the following facts:

(1) The P.U.C. did not intend to make, and did not make, any determination as to the prudence of the $1.453 billion investment at stake in this proceeding. Rather, the Commissioners clearly stated that they were holding a decision on the prudence of this amount in abeyance. Petition at 16, n.15 (citing App. at 288, 300, 301).

(2) When the P.U.C. decided to defer a decision on the rate recognition of the $1.453 billion investment, it believed that it had the authority to hear further evidence on that amount, either on rehearing or in a new proceeding. App. at 85a (Conclusion of Law 10), 289a, 299a.

(3) The Commission's decisional approach—to base a prudence determination upon its estimate of reasonably expectable cost as of 1979 and to withhold a decision as to the prudence of all cost growth over that amount until further studies were presented—

dual determination—(i) that it was not satisfied with the evidence before it and (ii) that it had the authority to defer a prudence determination until it received further evidence—was expressed in an integrated, intertwined set of findings and conclusions. Petition at 15. Further, it is correct that it would be mere speculation to assume that the Commission would have found imprudence with respect to the $1.453 billion and disallowed it if it had known it lacked authority to defer that decision.

It is equally speculative to suggest that the Commission would have reached the conclusion it did as to the adequacy of the evidence to decide prudence or imprudence had it known it lacked that authority to defer. For instance, as Gulf States pointed out at page 5 of its petition, the Examiners had recommended a finding that 46 percent of the cost growth could reasonably be attributed to regulatory causes. Proposed Finding of Fact 128; App. at 257a. The Commission's Final Order deleted that Finding without discussion. App. at 61a. Neither the parties nor the reviewing courts can know whether that deletion was the product of the Commission's conclusion

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was not one proposed by any party and was adopted by the Commission only after the evidence had closed. Petition at 5-6.

(4) The Supreme Court of Texas did not rule that the P.U.C. had determined the prudence or imprudence of the $1.453 billion investment. Rather, the Texas Supreme Court ruled that, when the Commission stated that Gulf States had not met its burden of proving that amount to be prudently incurred, the Commission, as a matter of law, "effectively disallowed that amount from rate base." 798 S.W.2d at 564, App. at 6a. That "effective disallowance" was not a finding of prudence or imprudence; it was the Texas Supreme Court's view of the legal effect of that Commission ruling.

(5) The Texas Supreme Court's majority opinion clearly states that an essential ("more important") element in that court's conclusion was its determination that the Commission erred in its belief that it had authority to defer this amount for further consideration. 798 S.W.2d at 564, App. 6a-7a. Yet, the majority of the Texas Supreme Court took no action to allow the Commission to consider the matter further in light of that error.

that it had authority to receive further evidence on the causes of cost growth, or whether the Commission, like the Examiners, would have found the record sufficient to support that Finding if it had known no deferral of its decision was possible. All that is known with certainty is that $1.453 billion of investment in operating plant has been disallowed with no finding of imprudence.

Respondent may disagree with Gulf States as to the legal effect to be given to the facts set out above. However, there is no justification for characterizing them as misstatements, or fiction, or myth.

Respondent CAUR also characterizes as "fiction" Gulf States' assertion that the Commission imposed a new proof requirement after the record had closed. CAUR Brief at 24. Again, this characterization is unjustified. Gulf States' assertion is not based on fiction.

Gulf States does not dispute the overall statutory standard to which it was subject: It had the burden of proving by a preponderance of the evidence that the rate increase which it sought was justified. Public Utility Regulatory Act, Tex. Rev. Civ. Stat. Ann. Art. 1446(c) § 40. Gulf States does not contend that this standard of proof was altered. However, at the conclusion of the case, after the record was closed, the Commission imposed *new proof requirements* which the Company would have to meet in order to satisfy the statutory standard.

Specifically, the Commission determined that it would base its River Bend prudence determination in Docket No. 7195 on an amount which it decided would have been a reasonable estimate of cost in 1979. In 1988, after the record had closed, the Commission declared that in 1979 a reasonable estimate of River Bend's cost would have been $2.273 billion. Findings of Fact 88, 93, 164, App. at 57a, 58a, 64a. The Commission only then further determined that it would hold the remaining River Bend investment, $1.453 billion, in abeyance, without disallowance, until it received further evidence on the reasons

for cost growth above *that* estimate. App. at 289a, 291a-92a, 300a. It was only when that approach was announced that the Company could have become aware that the Commission would require studies analyzing all cost growth above its 1979 estimate. The Commission adopted this approach only under the belief that it had authority to provide the opportunity to receive those studies.

Gulf States' petition raises an important due process question—whether it is barred from seeking a determination as to the prudence of a $1.453 billion investment by a prior Commission Order which never decided that prudence issue. Nor was the issue of prudence decided when the Texas Supreme Court held that the Commission's erroneous attempt to defer a decision on prudence had the unintended legal effect of effectively disallowing the $1.453 billion. The facts of this case squarely present the questions posed by Gulf States. Respondent CAUR's characterizations do not alter those facts or diminish the importance of the questions they present. Applying preclusive effect to the Commission's Order in the circumstances of this case does not satisfy minimum due process standards.

Respectfully submitted,

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